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Remarks:

Concerning our conversation yesterday on security recommendation concerning the definition of "intelligence material," you may find the attached memo helpful in so far as it bears on the issues raised. Please return as this is our file copy.

[redacted] Thanks Jon

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FROM: NAME, ADDRESS AND PHONE NO

OLC 7D35 [redacted] 19 Mar 68

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FORM NO. 1-67 237 Use previous editions GPO : 1968 O - 297-542 (40)

19 November 1968

MEMORANDUM FOR THE RECORD

SUBJECT: Communication of Classified Information by Government Officer or Employee

REFERENCE: OGC Memorandum dtd 1 November 1968 re Proposed Amendment to 50 U.S.C. 783(b) (OGC 68-2175)

1. The amendment to 50 U.S.C. 783 as proposed by the Deputy General Counsel would appear to be an important improvement in existing law, particularly in overcoming the evidentiary problems imposed by penal statutes in this area. This memorandum is designed to serve the constructive purpose of posing questions which may be raised in the course of its Congressional consideration.

2. Unauthorized Person - Congress. The proposed amendment to the Internal Security Act of 1950 makes it unlawful to communicate classified information to an unauthorized person.

Query: Vis-a-vis an unauthorized person, what is the status of a regularly constituted Congressional committee? Neither the proposed amendment nor the provisions of the Internal Security Act appears to provide a satisfactory answer. This may be particularly damaging in the light of the Otepka case from the viewpoint of the committees whose favorable consideration would be requested, and may be overcome by inserting a proviso paralleling 18 U.S.C. 798(c) or P.L. 89-487, section 3(f) quoted below:

> "Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof." (18 U.S.C. 798(c))
>
> . . .
>
> " . . . nor shall this section be authority to withhold information from Congress." (P.L. 89-487, Sec. 3(f)).

3. Unauthorized Person - Others. In the Scarbeck case the court had no trouble in holding that the classification standards and procedures of Executive Order 10501 as supplemented by Department of State regulations satisfied requirements of both 50 U.S.C. 783(b) and due process for a penal statute. Whether the recipients of the classified information were unauthorized, i.e., agents or representatives of a foreign government, was never at issue in the Scarbeck case.

> Query: Should this question become an issue, can the accused under the proposal identify an unauthorized person with sufficient preciseness to make or have reason to make the conclusion required by statute?

4. First, it is assumed that the answer in the affirmative would follow the reasoning used in the Scarbeck case that the class of persons subject to the statute is not the public at large but a relatively small group who have a public trust in this area and in the course of their Federal employment receive clear directions on how it is to be assumed and carried out. Second, presumably, the underlying directions for determining whether the accused had communicated classified information to an "unauthorized person" are found in Executive Order 10501 and regulations issued thereunder. Executive Order 10501 limits knowledge or possession of classified information to ". . . persons whose official duties require such access in the interest of promoting national defense and only if they have been determined trustworthy." (section 7) and imputes responsibility to the agency head to inform affected employees of special ground rules since the agency head is also directed to take stringent administrative action against employees who disclose classified information outside of the prescribed procedures and standards (section 19). Executive Order 10501 appears to place the burden squarely on the employee to determine whether the recipient is authorized to receive classified information before it is communicated.

5. Executive Order 10501. Even so, certain aspects of the Executive Order raise reasonable doubts on how one determines who is authorized (almost entitled) to receive classified information:

> a. Official Duties. It appears that classified information can only be communicated safely to those who have official duties (section 7). Yet, there can be "authorized persons" in or out of Federal service in the Judicial and Legislative Branches (section 5(j)). Can a person be authorized without

having "official duties"? Can anyone not a Federal employee have "official duties" and, if so, does this also make him a Federal employee or former Federal employee for the purposes of 50 U.S.C. 783(b)(2)?

b. Trustworthy. The Executive Order requires that the recipient of classified information be "trustworthy" (section 7). The problem in applying this standard may be characterized in the following questions:

(1) Who establishes "trustworthiness"?
(2) How is it established?
(3) Is trustworthiness imputed to an office, i.e., an elected Member of Congress, a member of the Bar?
(4) Is a security clearance a prerequisite?
(5) Does the existence of a security clearance eliminate all discretion or responsibility on one's part concerning someone else's "trustworthiness"?
(6) Could it be held unlawful to communicate compartmented information to an otherwise trustworthy official with a security clearance not cleared for the compartmented information?
(7) How will the standards be established? If they are already established in an Executive Order, what would be the advantages and disadvantages of incorporating that Executive Order in the proposed statute?
(8) If the standards are controlled by the Executive Order, could they be changed subsequent to enactment of the proposal? If so, could the fairness of the new standards be subject to challenge on grounds of meeting the due process requirements for a criminal statute?
(9) Who has the burden of proof in determining whether a person is or is not authorized?

6. Scope - Official Secrets Act. It appears that Federal employees (current and former) are the only class of persons within the scope of the sanctions of the proposed amendment (50 U.S.C. 783(d)). However, in making it unlawful for a Federal employee to communicate classified information to unauthorized persons the proposed amendment also appears to be laying a foundation for prosecuting recipients or intended recipients under the conspiracy, misprision of felony, or accessory after the fact statutes (18 U.S.C. 3, 4, 371) against persons who may have no connection with a foreign government. Further, in such a correlative prosecution and unlike the Espionage Statutes it apparently is irrelevant whether there is an "intent to injure or to aid" or whether the "classified information" was in fact already in the public domain.

7. Sanctions - 50 U.S.C. 783(d). The term "unauthorized person" is inclusive of the term "foreign agent." Yet, these two terms are treated in separate provisions. If the language in b(2) can be inclusive of the language in b(1), why not simply use the language in b(1) instead of setting up two distinct offenses.

> Query: Would a communication to a foreign agent, now indictable as only one offense under 50 U.S.C. 783(b), be indictable as two separate offenses under 783(b)(1) and 783(b)(2)?

8. Under the proposed amendment a recipient in the class of an "unauthorized person," b(2), is not subject to penalties under section 783 while a recipient in the class of "foreign agent," b(1), is.

> Query: Does the existence of two classes of unauthorized recipients (one attended by punishment and one not) tend to mitigate against successful prosecution of an alleged "foreign agent" under 50 U.S.C. 783(c) because of rules of construction and uncertainty as to which class the offender fits.

9. A violation of 783(b)(2) is subject to the same penalties as a violation under b(1). Should penalties for communication under 783(b)(2) be equated with penalties for communication to a foreign agent? More importantly, in the case of communication to a loyal United States citizen, let's say even another Federal employee, or a Senator or Congressman, can an unlawful communication result from inadvertence? There is no requirement in the proposed amendment that the communication be accomplished "knowingly or willfully." Shouldn't there be?

10. Need. Examples of the type of cases which the proposed amendment is intended to deter or punish and explanations of why they cannot be handled satisfactorily under existing law would be helpful in presentation. This would no doubt involve the Damoclese alternatives and the difficulty of proving intent which are rooted in the Espionage Statutes. However, we should also be prepared to discuss available sanctions outside of the Espionage Statutes. For example, is it possible to prosecute a Federal employee for malfeasance on a breach of public trust for violating Executive Order 10501?

11. Summary. The questions in this paper have been raised in the interest of assuring the amendments strongest presentation. Not all questions are of equal import. The most important considerations appear to be: that the proposed amendment not be directed at the Legislative Branch; that it not be an Official Secrets Act in another guise; and that the prohibited activity can be defined in supporting Executive Orders and regulations so that the effective and efficient conduct of Government business will not be impeded and the efficacy of 50 U.S.C. 783(b) as established in the Scarbeck case will not be eroded because of uncertainty as to whether any specific course of conduct may subject the actor to criminal sanctions.

STAT

Assistant Legislative Counsel

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OLC/LLM:rw (19 November 1968)

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Remarks:

Now that we have done all the work, we would expect that you could get this through within a month or so after the Congress convenes.

STAT

STAT

John S. Warner

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FROM: NAME, ADDRESS AND PHONE NO.	DATE
Deputy General Counsel 7D01 [redacted]	1 Nov 68

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FORM NO. 237 1-67 Use previous editions

OGC 68-2175

1 November 1968

MEMORANDUM FOR: Legislative Counsel

SUBJECT: Proposed Amendment of 50 U.S.C. 783(b)

1. Attached is a final draft revision of 50 U.S.C. 783(b) which has the approval of J. Walter Yeagley, Assistant Attorney General, Internal Security Division, Department of Justice. This has been worked on for a considerable period of time. We believe, if this could be passed, it would be significant improvement in existing law.

2. You will no doubt recall the trial and conviction of Scarbeck. His case was tried under the existing 783(b) in 1961, was affirmed in the Circuit Court, and certiorari denied in the Supreme Court. In essence, existing law makes it a crime to pass classified information to an agent of a foreign government or officer or member of a communist organization. The change makes it a crime to pass classified information to an unauthorized person. The significance of this law is that, unlike the espionage laws, i.e., 18 U.S.C. 793 and 794, there is no requirement that there be an intent to harm the United States or to aid a foreign government. Furthermore, under this statute, the court has specifically held that the issue of classification is not subject to question by the defense. Therefore, the prosecution is significantly easier than under the espionage laws.

3. We believe it appropriate to pass the action on this from OGC to OLC at this time although we will be glad to work with OLC in any way. It is our strong recommendation that the standard route

to securing legislation not be followed and CIA should not be the sponsoring agency. Since this is an amendment to the Internal Security Act of 1950, which was a project of the Internal Security Subcommittee of Senate Judiciary, that Subcommittee might well be interested in sponsoring on its own this amendment. Certainly this would be a more useful piece of work for the Subcommittee than some of their other projects of recent years.

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HN S. WARNER
y General Counsel

Attachment

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Approved For Release 2005/06/29 : CIA-RDP77M00144R001100170025-8

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S/ John S. Warner

JOHN S. WARNER
Deputy General Counsel

Attachment